

## § 68.10

## 28 CFR Ch. I (7–1–11 Edition)

promulgated since the date of the pleadings and which are relevant to any of the issues involved.

[Order No. 2203–99, 64 FR 7075, Feb. 12, 1999]

### § 68.10 Motion to dismiss for failure to state a claim upon which relief can be granted.

(a) The respondent, without waiving the right to offer evidence in the event that the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. The filing of a motion to dismiss does not affect the time period for filing an answer.

(b) The Administrative Law Judge may dismiss the complaint, based on a motion by the respondent or without a motion from the respondent, if the Administrative Law Judge determines that the complainant has failed to state a claim upon which relief can be granted. However, in the prehearing phase of an adjudicatory proceeding brought under this part, the Administrative Law Judge shall not dismiss a complaint in its entirety for failure to state a claim upon which relief may be granted, upon his or her own motion, without affording the complainant an opportunity to show cause why the complaint should not be dismissed.

[Order No. 2203–99, 64 FR 7075, Feb. 12, 1999]

### § 68.11 Motions and requests.

(a) *Generally.* The Chief Administrative Hearing Officer is authorized to act on non-adjudicatory matters relating to a proceeding prior to the appointment of an Administrative Law Judge. After the complaint is referred to an Administrative Law Judge, any application for an order or any other request shall be made by motion which shall be made in writing unless the Administrative Law Judge in the course of an oral hearing consents to accept such motion orally. The motion or request shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions or requests made during the course of any oral hearing or appearance before an Administrative Law Judge shall be stated orally and made part of the transcript. Whether a motion is made

orally or in writing, all parties shall be given reasonable opportunity to respond or to object to the motion or request.

(b) *Responses to motions.* Within ten (10) days after a written motion is served, or within such other period as the Administrative Law Judge may fix, any party to the proceeding may file a response in support of, or in opposition to, the motion, accompanied by such affidavits or other evidence upon which he/she desires to rely. Unless the Administrative Law Judge provides otherwise, no reply to a response, counter-response to a reply, or any further responsive document shall be filed.

(c) *Oral arguments or briefs.* No oral argument will be heard on motions unless the Administrative Law Judge otherwise directs. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the position taken.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534–91, 56 FR 50053, Oct. 3, 1991]

### § 68.12 Prehearing statements.

(a) At any time prior to the commencement of the hearing, the Administrative Law Judge may order any party to file a prehearing statement of position.

(b) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and shall briefly set forth the following matters, unless otherwise ordered by the Administrative Law Judge:

- (1) Issues involved in the proceedings;
- (2) Facts stipulated to together with a statement that the party or parties have communicated or conferred in a good faith effort to reach stipulation to the fullest extent possible;
- (3) Facts in dispute;
- (4) Witnesses, except to the extent that disclosure would be privileged, and exhibits by which disputed facts will be litigated;
- (5) A brief statement of applicable law;
- (6) The conclusions to be drawn;
- (7) The estimated time required for presentation of the party's or parties' case; and
- (8) Any appropriate comments, suggestions, or information which might

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assist the parties or the Administrative Law Judge in preparing for the hearing or otherwise aid in the disposition of the proceeding.

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### § 68.13 Conferences.

(a) *Purpose and scope.* (1) Upon motion of a party or in the Administrative Law Judge's discretion, the judge may direct the parties or their counsel to participate in a prehearing conference at any reasonable time prior to the hearing, or in a conference during the course of the hearing, when the Administrative Law Judge finds that the proceeding would be expedited by such a conference. Prehearing conferences normally shall be conducted by conference telephonic communication unless, in the opinion of the Administrative Law Judge, such method would be impractical, or when such conferences can be conducted in a more expeditious or effective manner by correspondence or personal appearance. Reasonable notice of the time, place, and manner of the prehearing conference shall be given.

(2) At the conference, the following matters may be considered:

- (i) The simplification of issues;
- (ii) The necessity of amendments to pleadings;
- (iii) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;
- (iv) The limitations on the number of expert or other witnesses;
- (v) Negotiation, compromise, or settlement of issues;
- (vi) The exchange of copies of proposed exhibits;
- (vii) The identification of documents or matters of which official notice may be requested;
- (viii) A schedule to be followed by the parties for completion of the actions decided at the conference; and
- (ix) Such other matters, including the disposition of pending motions, as may expedite and aid in the disposition of the proceeding.

(b) *Reporting.* A verbatim record of the conference will not be kept unless

directed by the Administrative Law Judge.

(c) *Order.* Actions taken as a result of a conference shall be reduced to a written order, unless the Administrative Law Judge concludes that a stenographic report shall suffice, or, if the conference takes place within seven (7) days of the beginning of the hearing, the Administrative Law Judge elects to make a statement on the record at the hearing summarizing the actions taken.

[54 FR 48596, Nov. 24, 1989. Redesignated by Order No. 1534-91, 56 FR 50053, Oct. 3, 1991]

### § 68.14 Consent findings or dismissal.

(a) *Submission.* Where the parties or their authorized representatives or their counsel have entered into a settlement agreement, they shall:

(1) Submit to the presiding Administrative Law Judge:

(i) The agreement containing consent findings; and

(ii) A proposed decision and order; or

(2) Notify the Administrative Law Judge that the parties have reached a full settlement and have agreed to dismissal of the action. Dismissal of the action shall be subject to the approval of the Administrative Law Judge, who may require the filing of the settlement agreement.

(b) *Content.* Any agreement containing consent findings and a proposed decision and order disposing of a proceeding or any part thereof shall also provide:

(1) That the decision and order based on consent findings shall have the same force and effect as a decision and order made after full hearing;

(2) That the entire record on which any decision and order may be based shall consist solely of the complaint, notice of hearing, and any other such pleadings and documents as the Administrative Law Judge shall specify;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the decision and order entered into in accordance with the agreement.

(c) *Disposition.* In the event an agreement containing consent findings and